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(2)

In The

Supreme Court of the United States

October Term, 1993

DEBORAH S. MARSHALL,

Petitioner,

v.

NELSON ELECTRIC, a unit of General Signal, and LUTHER NOAH,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE BRIEF OF RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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I.

STATEMENT OF THE CASE

Proceedings in the Courts Below

This Court is in effect being asked to review the Order and Judgment of the District Court for the Northern District of Oklahoma, dated June 21, 1991. Although Petitioner technically seeks certiorari from the Tenth Circuit's Order and Judgment, rendered June 29, 1993, the Court of Appeals did nothing more than summarily affirm the District Court's rulings. In its unpublished and nonprecedential opinion,[1] the Tenth Circuit said without much ado:

> . . . We have carefully reviewed the appendices which the parties have submitted. We have also conducted an exhaustive review of the pertinent authorities. We conclude that the district court's disposition was correct, and we therefore affirm for substantially the reasons set forth in that court's lengthy and well-reasoned opinion. In light of this disposition, we need not reach the issues raised in the cross-appeal.[2]
>
> The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

This brief opinion offers no reason to grant certiorari. Accordingly, Petitioner is forced to ask this Court to perform the same task performed by the Court of Appeals; Petitioner wants this Court to review the decision of the District Court.

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[1] The Tenth Circuit specifically stated that its Order and Judgment has "no precedential value."

[2] On its cross-appeal, Nelson Electric argued that there were alternative grounds for upholding the District Court's denial of the Title VII claim, specifically that Petitioner did not timely commence her administrative proceeding and that Noah's conduct did not violate Title VII.

Petitioner's first two arguments are addressed to the District Court's findings of fact and conclusions of law regarding Petitioner's Title VII hostile environment claim against Nelson Electric.[3] Significantly, the trial court rejected much of Petitioner's testimony, finding unworthy of belief the particularly egregious conduct in which the Petitioner alleged Noah engaged. Nevertheless, the District Court found that Noah had harassed Petitioner, and concluded, contrary to Petitioner's assertion in her Petition, that she **was** "subject to unwarranted sexual harassment by Noah . . . ". (See Appendix IV to Petitioner's Petition at p. 55A). The District Court held, however, that the employer, Nelson Electric, was not liable for such sexual harassment, specifically relying on agency principles as required by this Court's opinion of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

The District Court also rejected Petitioner's claim for retaliatory layoff, finding that Petitioner had not satisfied her burden of proving discriminatory motive; that Nelson Electric had established a proper non-discriminatory economic motive; that Petitioner had failed to show that such motive was pretextual; and that Petitioner was laid off pursuant to the terms of the valid and binding collective bargaining agreement in effect at Nelson Electric. Petitioner challenges none of these findings in her Petition.

As to Petitioner's state law tort claim for intentional infliction of emotional distress, the District Court, in granting Nelson Electric and Noah's motions for judgment n.o.v., held that the tort claim was barred by the

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[3] Prior to trial, the District Court granted summary judgment in favor of Noah on Petitioner's Title VII claim. Petitioner does not seek certiorari regarding this ruling.

statute of limitations of the State of Oklahoma. The District Court's limitations analysis is unchallenged by Petitioner in this Court.

Likewise, Petitioner does not challenge the portion of the District Court's Order which granted Nelson Electric's conditional motion for new trial on Petitioner's state law tort claim. The District Court based its ruling on the "drastically differing amounts of compensatory damages" rendered against Noah and Nelson Electric. (P. App. at 37A).[4] The jury had awarded $93,000 in compensatory damages against Nelson Electric, but awarded only $2,500 against Noah, even though Noah had been the only Nelson Electric employee arguably to commit outrageous acts. The District Court concluded that the varying awards were "irreconcilably inconsistent and against the great weight of the evidence." The District Court expressed the belief that the differing awards arose out of confusing jury instructions, and that the jury improperly "attempted to apportion damages between the individual defendant and the *deep-pocket* corporate defendant." (P. App. at 37A) (emphasis added).

II.

FACTS

The "Facts" section of the Petition can at best be described as a slanted view of the evidence presented at trial. Because this view was rejected by the District Court, however, Petitioner's efforts in this regard are improper. Petitioner knows, or at least should know, that this Court

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[4] Reference to "P. App." is to District Court Order dated June 21, 1991, and to the copy of the opinion appended to the Petition filed in this Court.

will not grant certiorari "to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Corp.*, 304 U.S. 175, 178 (1938). As Justice Holmes wrote, "We do not grant a certiorari to review specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925).

Given this standard of review, an appropriate view of the facts is as follows:

A. The Evidence Supports the District Court's Finding that Petitioner was a Leader in the Sexually Charged Atmosphere.

Petitioner describes herself in her Petition as an unwilling victim of Noah's conduct. The trial court found, however, that she "was a leading participant, if not the leader, in the sexually charged environment." (P. App. at 44A). A co-worker, who had been laid off by Nelson Electric before trial, testified that Petitioner was "one of the leaders" in the sexual talk, that Petitioner asked other employees, including Noah, "whether they had sex the night before," and told them "about the sex she was having." Petitioner described sexual encounters she had with her husband, friends and a co-worker. She told co-workers that she had sex with another man while her husband watched. Petitioner and other women jokingly used a yardstick pretending to measure the size of the penises of their male co-workers. A second female co-worker testified that Petitioner talked "about the various love making abilities of her lovers", including "who had the bigger genitals and who had the smaller genitals." According to this witness, all of the employees (including Petitioner) told sexual jokes, and Noah was around when Petitioner talked about her "boyfriend Larry." (Aplee

App. at 28, 30-33).[5] A third female co-worker testified that she had brought magazines showing male nudes and a Chippendales (male dancers) calendar. She also said that the sexual talk was not an ev ry day occurrence, but she admitted, however, that these discussions would occur from time to time and that Petitioner would sometimes lead the discussion. On occasion, Petitioner told co-workers about her sexual adventures in a house she was cleaning, including a description of the different rooms in which she had sex. This co-worker described Petitioner as a "tease." (Aplee App. at 147, 150-152, 154).

While Petitioner testified that Noah listened in on the women's conversations, asking them personal questions, her co-workers testified that it was the female employees who talked about sex in front of Noah, saying that Noah "would be included. The fellow was sitting right there. He really had no choice." One female co-worker testified that Noah occasionally told them "not to talk about these kinds of things." According to another co-worker, Noah only talked about his sex life "when he was asked." (Aplee App. at 39-43, 151-152, 155).

Petitioner testified that she (and other women) used the fire stop putty[6] to model a male sex organ on only *one* occasion, claiming that she only made *one* to embarrass Noah into stopping similar use of the putty. (Aplee App. at 13-14). Her female co-workers uniformly disagreed. One of them testified that while she did not see Noah make any of the clay penises, all of the girls made them, Petitioner made "more" of them than anyone else, and

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[5] References to "Aplee App." are made to the Joint Appendix filed by Nelson Electric and Noah with the briefs in chief in the United States Court of Appeals for the Tenth Circuit. The Joint Appendix was filed on July 23, 1992.

[6] The putty is a fire resistant material used to prevent fires from spreading through electrical switches. (Aplee App. at 148).

Petitioner and the others would "giggle" about them. Another testified that Petitioner would "show them to people and laugh about it." A third testified that all of the girls made them and that Petitioner could have made as many as ten of them. Supervisor Bell, who had been laid off before trial after 28 years at Nelson, testified that Petitioner showed off, laughed and joked about her phallic art work. (Aplee App. at 29-30, 44, 106, 149-150).

Such "sex-play" occurred only occasionally. Petitioner, however, was the catalyst, as it stopped altogether when she left the department. (Aplee App. at 139).

B. The Evidence Supports the District Court's Finding that Noah did not Commit the Egregious Acts of Harassment Claimed by Petitioner.

Petitioner says that Noah played with the clay sex objects, but none of her co-workers saw this. Similarly, Petitioner testified that Noah dropped his pants, but her co-workers testified that it was the women who accidently "tugged" on them too hard. Two of these same co-workers disputed Petitioner's claim that Noah "grabbed" at the women, "touched" the women in a sexual manner, much less touched Petitioner's private areas. (Aplee App. at 33-34, 37, 38, 44, 146).

Noah also denied the misconduct alleged by Petitioner, including Petitioner's claim that Noah pressured her to have sex, and that Noah thereafter retaliated by laying her off. (Aplee App. at 47, 49, 50, 133-136, 139-143). Those who frequented Petitioner's work area never observed harassment by him. (Aplee App. at 47, 50, 53-54, 100, 109-110, 133, 156-157, 165). The trial court found "unworthy of belief" Noah's alleged propositioning and other egregious acts of harassment. (P. App. at 44A).

C. The Evidence Supports the District Court's Finding Regarding the Responsiveness of the Union Steward.

Substantial evidence supports the trial court's findings regarding the responsive actions of the union steward, evidence which was ignored in the Petition. Union steward John Fitzgerald received a complaint from Petitioner on June 30, 1986 about "dirty talk" in the shop. Although this was the only time that Petitioner complained to Fitzgerald about anything arguably related to sexual harassment, Petitioner had complained to Fitzgerald about many other things. She complained about her friend *not* receiving extra wages, over her skin being infected, and even over not being able to wear tennis shoes to work. In fact, Petitioner was one of the steward's biggest complainers. As union steward, however, his job was to represent the interest of all employees and to file grievances for them even if he thought they were invalid. As to Petitioner, he filed grievances even though he knew they were not winnable. (Aplee App. at 61-65, 70-72, 76A; and Def. Exhs. 12 and 13, Aplee App. at 252-262).

On June 30, 1986, when the steward heard Petitioner complain about "dirty talk," she made no mention of the details she later claimed characterized Noah's conduct such as asking for sex. The steward immediately had a discussion with Petitioner and Noah. Both said the other had engaged in dirty talk, and the steward concluded both were guilty of "saying things they shouldn't be saying at the plant." In fact, the steward had previously heard Petitioner use this type of dirty language – she once told a group of male employees that "Charlie [her husband] tried to fuck me to death last night but he

wasn't man enough to do it."[7] She asked another male employee to "hunch" on her because she was "horny." (Aplee App. at 59-60, 72-73, 76, 137-138).

The steward told both Petitioner and Noah to stop using inappropriate language, and told Petitioner to come see him if "she had any further problems." Petitioner never again complained to the steward about dirty talk or sexual harassment. (Aplee App. at 66, 73-74).

After scolding Noah and Petitioner, the steward went to see Bill Coleman, Nelson's human relations manager. He told Mr. Coleman that he "had the problem under control" and would advise him if he needed any assistance. Thereafter *the steward checked with Petitioner to see if there was any further problem, and Mr. Coleman was in Petitioner's work area approximately 8-15 times a week. Neither received any complaints from Petitioner about sexual harassment.* (Aplee App. at 74, 67-69, 82-83, 95).

After Petitioner was laid off on August 16, 1986, she "bumped" or transferred into another job in another department. Curiously, rather than relieved to be away from Noah's alleged harassment, however, she then often visited Noah's department and went to extraordinary lengths to be transferred back there (Aplee App. at 10, 15). She filed a union grievance on September 18, 1986. (Pl. Ex. 33; Aplt App. at 545).[8] Petitioner's grievance stated that she wanted to transfer back to her old department, making no mention of the alleged sexual harassment. Petitioner claims that she failed to mention the harassment because the union steward told her she could not file a grievance for harassment. The steward testified

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[7] Petitioner's husband, Charles Marshall, worked at Nelson at the time.

[8] References to "Aplt App." are to the Appendix filed by Petitioner with brief in chief to the court of appeals.

otherwise, stating that he "never" told her (or anyone else) she could not file a grievance for sexual harassment, and that Petitioner made no complaint to him about sexual harassment when she filed the grievance. (Aplee App. at 75). In fact, the collective bargaining agreement prohibited discrimination based on sex, and stated that grievances could be filed for sexual harassment. (Art. II of Petitioner's Exh. 58, Aplee App. at 579; Aplee App. at 52).

D. The Evidence Supports the District Court's Finding that Nelson Electric Promptly Responded to Petitioner's Complaints.

Substantial evidence supports the trial court's findings regarding the responsiveness of Nelson's management.[9] A week after denial of Petitioner's grievance requesting Petitioner's return to Noah's department, Petitioner wrote to Nelson's President alleging sexual harassment.[10] This was the first notice of any claim of sexual harassment to Nelson, other than the union steward's mention of "dirty talk" which the steward told Nelson management he had under control. Immediately after the

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[9] Petitioner's statement that Nelson had no policy against sexual harassment is untrue. The District Court specifically found that Nelson "had a policy against sexual harassment", and "had established an effective means for employees to voice complaints of harassment without having to go through the alleged harasser." (P. App. 47A). The finding is supported by the record.

[10] There was substantial evidence that Petitioner's letter to the President was really prepared to obtain her return to Noah's department. Petitioner told a co-worker that she was submitting the letter because of her layoff, and later said she would drop all the sexual harassment allegations if they would just give her old job back to her. (Aplee App. at 55-56, 58).

letter was received, human relations manager Bill Coleman commenced his investigation. Coleman took statements from many individuals, completed his investigation in *ten days*, and concluded that Noah, while not engaging in intentional harassment, had exercised poor judgment in allowing sexually oriented talk in his department. Although Coleman found that Petitioner voluntarily participated in the sexually oriented activity, Nelson determined that it would be inappropriate for Noah's employment to continue, and permitted Noah to take early retirement. Nelson reported the results of the investigation to Petitioner, who made no other complaint of sexual harassment during the remainder of her employment. (Aplee App. at 78, 88-92, 93-94, 96, 206-209, Resp. Exh. 3-6, Aplee App. at 234-251).

E. The Evidence Supports the District Court's Rejection of the Retaliatory Layoff Claim.

As the trial court found, Petitioner was laid off on July 2, 1987 solely for economic motives, not in retaliation as claimed by Petitioner. Nelson's work force dropped from 198 to 115 employees during 1986 and 1987, and the economic downturn in Petitioner's department merely reflected the continuing decrease in the overall work force at Nelson Electric during these years. (Aplt App. at 375). Additionally, Nelson's business declined from early 1986 through 1988 as a result of the recession in the petrochemical industry. Sales declined dramatically. From 1985 to 1987, sales dropped $22,000,000. As a result, Nelson had to sell product lines and lay off employees. (Aplee App.. at 110-111, 229-233, 162-166). During 1986 and 1987, because of the economic downturn, 255 layoffs occurred, involving 148 employees. In the month bracketing Petitioner's layoff, the work force dropped from 128 to 119. (Def. Exhs. 84, Aplee App. 505; 75, Aplee App.

496-497; 76, Aplee App. 498-504; 104, Aplee App. 558-567; Aplee App. at 209-217). Four employees were laid off the same day as Petitioner. (Def. Exh. 76, Aplee App. at 498-504). Pursuant to a collective bargaining agreement, layoffs were done by seniority within job classification in each department. At the time of the July 2, 1987 layoff, there were only two employees in Petitioner's Department and classification, Petitioner and a male employee. Both were laid off. (Aplt App. at 94, 723-24; Def. Exh. 78, Aplee App. at 504A-504B). Co-workers testified that the "work ran out" at the time of the layoff. (Aplee App. at 77).

F. Other Factual Errors in the Petition.

Except as to the first full paragraph on p. 8 of the Petition, the remainder of the Petition "Facts" section is fiction and is hereby challenged by Nelson Electric and Noah.

III.

ARGUMENT AND AUTHORITIES

A. Summary of Argument.

Simply put, Petitioner asks this Court to grant certiorari because she disagrees with the factual findings made by the District Court and affirmed by the Court of Appeals.

Petitioner does not argue that the Tenth Circuit opinion, or that of the District Court, is in conflict with a decision from another court of appeals. Nor does she make any other argument that any of the reasons for granting certiorari listed in Rule 10 of the Supreme Court Rules is applicable.

Moreover, the first two arguments raised by Petitioner were addressed by this Court's decision in *Meritor*

Savings Bank v. Vinson, 477 U.S. 57 (1986). Petitioner does not argue that *Meritor* was improperly decided or that the District Court did not follow its teachings.

Petitioner acknowledges that *Meritor* dealt with the first two issues of her Petition, but asks this Court to grant certiorari to "clarify" *Meritor*. Petitioner, however, does not say how *Meritor* should be clarified. She does not say what rule the Supreme Court should announce. She does not say whether the result reached by the District Court should be changed under the clarification. She does not point to any opinions from the courts of appeals which support the clarifications she has in mind.

Reading the Petition in the kindest and gentlest way, it is possible to construe the Petition as a request that this Court sit as a super-legislature and announce new requirements for Title VII claims without the foundation of a conflict between the circuit courts to provide assistance. Under this reading, certiorari is not appropriate.

A more plausible reading of the Petition is that Petitioner wants this Court to overturn the Tenth Circuit because she does not like the findings of fact made by the District Court. Petitioner acknowledges that *Meritor* dealt with the first two issues of her Petition, and appears to be asking this Court to review the facts of the case at bar. Petitioner would have this Court sit as a reviewer of the evidence, a function performed by the District Court. This is not a valid reason for the granting of certiorari. *See General Talking Pictures Corp.* and *United States v. Johnson*, both discussed at pp. 3-4, *supra*.

B. Granting Certiorari on the Issue of Petitioner's Conduct would be a Useless Gesture and would not Change the Result Reached by the Court Below.

Petitioner's first proposition asks whether conduct of a Title VII claimant is relevant in determining a hostile

environment claim. This proposition fails to support certiorari for several reasons:

1. Petitioner's assertion that a claimant's conduct is not relevant was rejected by this Court in *Meritor.*
2. Petitioner does not point to any conflict among the courts of appeals. In fact, the cases that she cites are consistent with the results reached below.
3. Petitioner does not argue that this case is distinguishable from *Meritor.*
4. The District Court followed this Court's teachings in *Meritor,* finding that some of Noah's conduct was welcomed by Petitioner, while other conduct was unwelcome.
5. The stated basis for Petitioner's proposition – her claim the District Court refused to find sexual harassment because of her conduct – is false. The District Court specifically concluded that Noah sexually harassed Petitioner, even though the District Court also found that she "welcomed" some of his conduct. In other words, Petitioner's conduct was not a factor in the result reached by the District Court – the court determined that sexual harassment had occurred despite Petitioner's conduct. Accordingly, even if this Court were to overrule *Meritor,* and rule as Petitioner suggests that a claimant's conduct is irrelevant in determining whether the supposed harassment was welcome, the result in this case would be unchanged. The District Court would still find that sexual harassment had occurred.

Any of these reasons is sufficient to deny certiorari. The District Court made very specific findings and conclusions regarding the conduct of Noah. It concluded Petitioner "was subject to unwarranted sexual harassment by Noah between 1985 and August 12, 1986." (P.

App. at 55A). Contrary to Petitioner's assertion, the District Court did not use her conduct to determine "that the sexual harassment was not a condition of petitioner's employment because of her participation in group activity . . . " (Petition at p. 11); the District Court never made such a statement. Instead, it concluded that Nelson Electric was not liable for Noah's improper conduct because Noah was not Nelson Electric's agent. In making this ruling, the District Court relied on the agency analysis announced by this Court in *Meritor.* (P. App. at 56A). *See* discussion *infra,* at pp. 18-19.

The District Court also rejected some, but not all, of the claims of harassment alleged by Petitioner. The court found that her testimony was "exaggerated" and referred to the "tattered remains" of her credibility. (P. App. at 42A) The District Court specifically rejected her testimony regarding Noah's supposed proposition and later retaliatory layoff of her, saying her testimony was "unworthy of belief." (P. App. at 44A)

The District Court also found that Petitioner "welcomed much of Noah's conduct and did not find it offensive on many occasions. On other occasions "she asked Noah to leave her alone." (P. App. at 43A) The District Court, however, did not use this finding to deny Petitioner's hostile environment claim. In spite of this finding, the District Court concluded that Noah's acts constituted sexual harassment, but went on to find that the actions were not binding on Nelson Electric. (P. App. at 55A-56A).

These findings provide no grounds for this Court to grant certiorari. This present case falls under the rule announced in *Meritor* that a claimant's sexually provocative actions are relevant in determining whether she found specific sexual advances unwelcome. This Court said (477 U.S. at 68-69):

> Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," . . . which the District Court apparently admitted into evidence, "had no place in this litigation." . . . The apparent ground for this conclusion was that respondent's voluntariness vel non in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such claim, *it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.* (Emphasis added).

In the case at bar, Petitioner was the leader of the sexually provocative activity. She not only participated in it, the District Court also found that she "was a leading participant, if not the leader . . . " (P. App. at 44A).

Petitioner argues that her conduct is not relevant to the welcomeness issue, claiming that she only talked about sexual things with her female co-workers. This argument, however, was rejected by the District Court and is unsupported by the record. Petitioner talked about her sexual partners and sex acts in front of Noah, proudly showed her phallic artwork to Noah and other male co-workers, and jokingly used a ruler to measure genitals of her male co-workers. Furthermore, this evidence was just the tip of the iceberg; any effort by Petitioner to argue that she only engaged in "girl talk" is not supported by the record.

Petitioner then says that her conduct should not be viewed as welcoming Noah's alleged request for sex. The District Court, however, rejected her testimony and found that there had been no request for sex. (P. App. at 44A). Thus, for purposes of review, there was no sexual solicitation by Noah.

More importantly, the District Court recognized the distinction described by Petitioner – that her participation in sexually-charged activity did not mean that she welcomed all of Noah's conduct. The District Court found (P. App. at 43A, 47A, 55A):

> Marshall [Petitioner] welcomed much of Noah's conduct and did not find it offensive on many occasions. On other occasions she asked Noah to leave her alone.
>
> * * *
>
> The Court finds Marshall was subject to unwanted sexual harassment by Noah between 1985 and August 12, 1986.
>
> * * *
>
> The Court concludes Marshall was subject to unwanted sexual harassment by Noah between 1985 and August 12, 1986.

Further, neither of the decisions cited by Petitioner is inconsistent with the District Court Order or with *Meritor*. In *Wyerick v. Bayon Steel Corp.*, 887 F.2d 1271, 1275 (5th Cir. 1989), the court reversed a summary judgment and required the trial court to determine whether the claimant's "three sexual comments" established that the complained-of conduct was welcome. In *Swentek v. USAIR, Inc.*, 830 F.2d 552, 557 (4th Cir. 1987), the court held that the "past conduct" of the plaintiff which was unknown to the harasser could not be used to conclude that she welcomed the harasser's conduct. The Fourth Circuit specifically distinguished its case from *Meritor*, where the claimant's conduct occurred in the presence of the supervisor. *Id.*

All of these standards are consistent with the result reached by the District Court. A trial was held and evidence of Petitioner's conduct was received and analyzed under the *Meritor* standard. Much of the conduct was in the presence of Noah. Finally, the District Court found

that Petitioner welcomed some of Noah's conduct, but found other actions unwelcome. Thus, the reasoning of *Swentek* and *Wyerick* is fully consistent with the District Court Order and supports the result reached below.

The decision of the District Court is also consistent with the Supreme Court's recent decision in *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 1993 WL 453611 (U.S. 11/9/93), wherein the Court reaffirmed the rule:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at *all the circumstances.* (Emphasis added).

Any rule which would restrict the type of evidence to be considered would not be workable. The fact finder must be permitted to look at all of the circumstances. The District Court did so here, determining that some of the conduct was welcome, and some was not.

In summary, Petitioner offers no reason to grant certiorari.

C. Petitioner Offers No Authority or Reason to Grant Certiorari on the Issue of Employer Liability.

Certiorari should not be granted on Petitioner's second proposition for the following reasons:

1. Contrary to Petitioner's assertion, no conflict exists among the circuits on the issue of employer liability for actions of supervisors;
2. Petitioner cites no authority that is inconsistent with the findings or conclusions of the District Court;
3. All of Petitioner's citations are factually distinguishable, because they deal with employer liability where the harasser is a "supervisor." Here the District Court specifically found that Noah was not a supervisor;

4. Even if Noah had been a supervisor, application of the standards of employer liability contained within the decisions relied upon by Petitioner would not change the result in the case at bar. The District Court applied each of these tests, resolving all issues against a finding of employer liability.

With regard to employer liability the District Court found (P. App. at 47A, 56A):

(i) Noah "was not a supervisory employee within the meaning of Title VII."

(ii) "Moreover, Noah was not acting within the scope of his authority as a foreman at Nelson Electric when he sexually harassed Marshall."

(iii) "Nelson Electric had established an effective means for employees to voice complaints of harassment without having to go through the alleged harasser and had a policy against sexual harassment."

(iv) "The Court finds Nelson Electric, through its officers and supervisors, neither knew nor should have known of the sexual harassment by Noah until October 1986."

(v) "Moreover, the Court finds that once Nelson Electric was made aware of the harassment, Nelson took prompt remedial action. Nelson did not ignore the conduct of Noah, nor did Nelson acquiesce in the conduct of Noah."

(vi) "To the contrary, Nelson investigated the matter and Noah was removed."

(vii) "Nelson Electric is not responsible or liable under Title VII for the improper conduct of Noah. Nelson

> Electric was not negligent or reckless in handling Marshall's complaints, and Marshall has not proven that Noah, in engaging in the offensive conduct, purported to speak or act on behalf of Nelson Electric, relied upon apparent authority from Nelson Electric, or that his offensive conduct was aided by the existence of an agency relationship with Nelson Electric."

Petitioner, ignoring these findings and conclusions, attempts to draw a conflict between the Eleventh Circuit decision in *Sparks v. Pilot Freight Carriers*, 830 F.2d 1554 (11th Cir. 1987), and the Tenth Circuit's opinion of *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987). Each of these cases, however, concerns employer liability for harassment by supervisors. *Hicks*, 833 F.2d at 1416, 1418; *Sparks*, 830 F.2d at 1557, 1560. These cases have no bearing on the present case, as the District Court found that Noah was not a supervisor.[11] Although Title VII liability may exist for non-supervisory employees, the distinction is significant as supervisors and agents are more likely to create employer liability than are non-supervisors. *See generally* EEOC Guidelines, 29 C.F.R. § 1604.11(c) and (d).

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[11] Petitioner, appropriately, does not ask this Court to review the District Court's finding that Noah was not a supervisory employee. This was the function of the Tenth Circuit, and is not an appropriate ground for the granting of certiorari. *See General Talking Pictures Corp.* and *United States v. Johnson*, discussed on pp. 3-4, *supra*. In any event, the record supports the District Court's finding. John Bell, Noah's supervisor, testified that Noah lacked the authority to hire, fire or lay off employees (Aplee App. at 101-102). Contrary testimony referred to by Petitioner was rejected by the District Court.

Further, even had Noah been found to be a supervisor, there is no conflict between *Sparks* and *Hicks*, and more importantly no conflict between either of them and the District Court Order. Both the *Hicks* and *Sparks* courts primarily looked to § 219(2) of the Restatement (Second) of Agency[12] to determine employer liability. Each court, using § 219(2)(d), looked to whether the supervisor purported to act or speak on behalf of the principal, whether there was reliance on apparent authority, and whether the supervisor was aided in accomplishing the tort by the existence of the agency relationship. The Tenth Circuit, applying an **alternative** test for liability under § 219(2)(b), also looked to whether the employer had been negligent or reckless. *Hicks*, 833 F.2d at 1418. The District Court applied all of these tests and resolved them against the Petitioner. (P. App. at 56A and pp. 18-19, *supra*).[13]

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[12] Section 219 of the Restatement (Second) of Agency states:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

(a) the master intended the conduct or the consequences, or

(b) the master was negligent or reckless, or

(c) the conduct violated a non-delegable duty of the master, or

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

[13] Similarly, there is no conflict between the decision below and the other cases relied on by Petitioner. In *Shrout v. Black Clawson Co.*, 689 F.Supp. 774, 779, 781, the harasser was the claimant's supervisor, and upper management knew or

These appear to be the tests which Petitioner wants this Court to adopt. Yet, Petitioner fails to tell this Court that the District Court already applied them.

D. The Doctrine of Law of the Case is Well-Settled Law and Inapplicable to the Proceeding Below.

Petitioner's law-of-the-case contention provides no basis for the granting of certiorari, because:

1. The doctrine is well-settled, there being no split in the circuits justifying the grant of certiorari;
2. The doctrine is inapplicable to the proceedings below; and
3. Petitioner offers no cases supporting her position.

It is well-settled that the denial of a motion for summary judgment does not preclude the granting of a judgment n.o.v. In fact, Petitioner's argument was rejected in *Sandoval v. United States Smelting, Refining & Mining Co.*, 544 F.2d 463, 464 (10th Cir. 1976):

> Appellant here contends the trial court erred by granting a directed verdict when it had earlier denied appellee's motion for summary judgment. She argues that since evidence garnered at

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reasonably should have known of the harassment but failed to remedy the problem. None of these circumstances exists in the case at bar.

Petitioner improperly cites *Howard University v. Best*, 484 A.2d 958 (D.C. App. 1984). The portion of the opinion referenced by Petitioner refers not to Title VII, but to the tort of intentional infliction of emotional distress. The case was also factually distinguishable, involving a supervisory employee.

Petitioner's citation to Justice Marshall's concurring opinion in *Meritor* is also misplaced. Justice Marshall's view that employers were automatically liable for the acts of their supervisors was rejected by a majority of the Court. *Compare* 477 U.S. 76-78 *with* 477 U.S. at 72.

> the discovery stage was virtually identical to that introduced at trial, the court's directed verdict, when summary judgment was previously denied, was improper. However, a denial of summary judgment does not rule out the possibility of a directed verdict. (citations omitted)

Accord, The Catts Co. v. Gulf Ins. Co., 723 F.2d 1494, 1502 (10th Cir. 1983). Moreover, Rule 54(b), Fed.R.Civ.P., provides that all orders of a trial court are "subject to revision at any time before the entry of judgment."

These Tenth Circuit decisions comport with the rulings of the Supreme Court that a trial judge retains at all times the power to re-examine and if necessary alter a previous ruling in order to avoid perpetuation of error. *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186 (1950), and *Messenger v. Anderson*, 225 U.S. 436 (1912).

The other cases cited by Petitioner do not contain a different rule. Petitioner cites *United States v. Horton*, 622 F.2d 144 (1st Cir. 1980), for the proposition that ***granting*** of a summary judgment becomes law of the case, but fails to note that the *Horton* court held the ***denial*** of a summary judgment motion decides nothing (*id.* at 148):

> It is commonly held "where the order of the court is a mere denial of the motion for summary judgment and the court does not specify what facts are uncontroverted, the order establishes nothing as the facts and all issues made by the pleadings are open at trial." (citing 6 J. Moore's Federal Practice § 56.04[1] (1975)).

Petitioner similarly cites *Eastern Tunneling Corp. v. Southgate Sanitation District*, 487 F.Supp. 109, 116-118 (D. Colo. 1979), but there the district court, despite saying that its earlier decision denying summary judgment was law of the case, reconsidered its ruling based on additional evidence and granted a partial summary judgment. These two cases, which were the only two cases cited by

Petitioner expressly dealing with summary judgment, do not support Petitioner's claims. Simply put, Petitioner offers no case which would hold that a summary judgment denial precludes the later grant of a judgment n.o.v.

Moreover, even the cases cited by Petitioner recognize that the law of the case doctrine is inapplicable where new evidence is available. *See, e.g., Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169 (3rd Cir. 1982). New evidence was certainly available in the case at bar. The rulings denying summary judgment were made early in the case. Without adopting an explicit rule of law, the Magistrate clearly indicated that his report and recommendation were based on his review of **affidavits**. The District Court accepted the report and recommendation and found that issues of fact precluded summary judgment. (Aplt App. at 54, 58). By contrast, the trial took place more than one (1) year later. After the seven (7) day trial, the District Court determined that there were no issues of fact – that no outrageous conduct had occurred within the limitations period.

Petitioner's contention that no new evidence was offered is not only inconsistent with the record below, it is implausible on its face. The denial of Petitioner's summary judgment motion decided nothing more than that there might be a triable issue based on the affidavits, whereas the issue at trial was whether the evidence was sufficient to submit the claim to the jury. After hearing all of the evidence, the District Court in the present case concluded that there was no triable issue. This ruling was affirmed by the Tenth Circuit.

In summary, the law-of-the-case doctrine is inapplicable here. Under settled law, the denial of a summary judgment does not preclude the granting of a directed verdict or judgment n.o.v. Accordingly, there is no reason to grant certiorari.

E. The Trial Court was not Required to Follow the Jury's Factual Findings when Ruling on Petitioner's Title VII Claim.

Petitioner's brief offers no reason for the Supreme Court to grant certiorari to review the District Court's decision not to follow the jury's factual findings. To the contrary, certiorari should be denied for the following reasons:

1. Petitioner cites no court of appeals decision inconsistent with the District Court's decision;
2. The jury verdict was not binding because the essential elements of a Title VII claim and state-law claim for intentional infliction are different;
3. The jury verdict was not binding because it was infirm;
4. Because the proposition urged by Petitioner involves state common law, any decision by this Court would be limited to the law of one state, and could be later undercut by changes to Oklahoma law; and
5. Because of the passage of Civil Rights Act of 1991 permitting jury trials in all Title VII cases, this issue will not arise in the future.

The issue raised by Petitioner is a relic of a bygone age. Since the passage of the Civil Rights Act of 1991, all Title VII plaintiffs are entitled to a jury trial,[14] and surely would request one in every case in which they would likewise request a jury trial on a claim for intentional infliction of emotional distress. As a consequence, review of the issue would likely have scant effect on future Title VII litigation. For this reason alone, certiorari should be

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[14] *See* 42 U.S.C.A. § 1981.

denied on this issue. This Court's time is too valuable to decide issues which would be applicable only to a very few cases.

Further, the District Court correctly decided that the jury verdict was not binding in its adjudication of the Title VII claims for two reasons that are well recognized by the circuit courts – the essential elements of a Title VII claim differ from those of Petitioner's state law claim, and the jury verdict was infirm and a nullity. Petitioner cites no case rejecting the application of either reason.[15]

1. The Essential Elements Were Different.

The District Court correctly noted, and Petitioner recognizes, that the jury findings would not be binding if the elements of the emotional distress claim were different than the elements of the Title VII claim. The Tenth Circuit has addressed whether the "essential elements" of the two claims are identical in *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1345 (10th Cir. 1990), where the court said:

> Weyerhaeuser argues that the district court's finding in the Title VII action did not have to be in accord with the district court's understanding of the general verdict returned by the jury since the essential elements of the Title VII claim were not the same as the essential elements in the present claim. Be that as it may, we do not regard the district judge's comment to indicate

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[15] Two of Petitioner's cases do not deal with the application of either reason, instead stating general principles regarding the effect of jury findings on contemporaneously tried equitable issues. *See Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988); and *Miller v. Fairchild Industries, Inc.*, 855 F.2d 498, 507 (9th Cir. 1989), *cert. denied*, 494 U.S. 1056. Petitioner's third case does not even deal with the applicability of jury verdicts to equitable claims, but instead with inconsistent special verdicts. *See Floyd v. Laws*, 929 F.2d 1390, 1397 (9th Cir. 1991).

that he was "bound" to follow his understanding of the jury's verdict.

Petitioner also refers to two cases where the courts found respectively that a Section 1983 claim and a Section 1981 **disparate impact** claim had elements different from Title VII, such that the jury verdicts were not binding on contemporaneously tried Title VII claims. *See Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1013-14 (6th Cir. 1987); *Lincoln v. Board of Regents of the University System of Georgia*, 697 F.2d 928, 935, n. 6 (11th Cir. 1983), *cert. denied* 464 U.S. 826.

Petitioner, however, cites no authority holding that the essential elements of Title VII and intentional infliction of emotional distress are identical. Without such authority, it makes little sense for this Court to grant certiorari. This is particularly so when the question turns on the interpretation of state law, here Oklahoma common law, defining the tort of intentional infliction of emotional distress. *See Eddy v. Brown*, 715 P.2d 74 (Okla. 1986). As this Court is aware, it is not the final arbitrator of Oklahoma law, and any decision it might make could be undercut by later decisions of Oklahoma courts, and in any event would have applicability only to cases governed by Oklahoma law or similar laws of other states.

In any event, important distinctions exist between the essential elements of Petitioner's emotional distress claims and her Title VII claims. For example, the elements of respondeat superior under Oklahoma law differ from agency principles used under Title VII. *Compare Hill v. McQueen*, 230 P.2d 483 (Okla. 1951), and *Dill v. Rader*, 533 P.2d 650 (Okla. App. 1975), *with Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (1987). Moreover, the actions of Noah must be found to be extreme and outrageous under the state-law tort, while they must be hostile and abusive to constitute a Title VII violation. *Compare Harris v. Forklift*

Systems, Inc., ___U.S.___, 1993 WL 453611 (U.S. 11/9/93), *with Eddy v. Brown*, 715 P.2d 74 (Okla. 1986).

Therefore, the jury's verdict on the state tort claim did not involve the same factual issues as the Title VII claims, and the District Court properly determined that the jury's verdict did not bind its adjudication of Title VII claims.

2. The Jury Verdict was Infirm and a Nullity.

The District Court rightly determined that because the jury's verdict on the emotional distress claim was infirm and a nullity, it did not bind the court's adjudication of Title VII claims. Here, the verdict was infirm and a nullity, because the District Court had not only granted Nelson Electric's and Noah's motions for judgment n.o.v., but also had granted Nelson Electric's motion for new trial. Under these circumstances, the jury's verdict became merely advisory. The District Court said (P. App. 19A and 20A):

> However, if the intentional infliction of emotional distress claim should not have been submitted to the jury in the first place, the jury's findings are viewed as an academic exercise, a nullity, and nothing more than advisory. Under such circumstances, the jury's factual findings would not be binding on the Court for purposes of the Title VII claim. *Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1560 (11th Cir. 1988) (trial court's conditional rulings concerning damages, in the event its ruling on the motion for jnov was reversed, were "advisory" only and were not binding); *Williams v. Slade*, 431 F.2d 605, 609 (5th Cir. 1970) (courts have refused to grant a partial new trial on liability alone where the damages issue had been resolved in a "purely academic atmosphere"); *O'Neill v. United States*, 411 F.2d 139, 146 (3rd Cir. 1969) (trial court's

> conditional assessment of damages, in the event the defendant's judgment was reversed on appeal, bore the characteristic of an "advisory opinion," was "purely academic" when made, and did not pass through the refining pressure of reality"); *Romer v. Baldwin*, 317 F.2d 919, 923 (3rd Cir. 1963) (when the jury assessed damages in favor of plaintiff despite finding no liability on the part of defendant, the jury's assessment was "merely an intellectual exercise" and not binding on remand); *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987) (Seventh Amendment does not require the trial court to conform its findings to a jury verdict that is infirm); *see also Williams v. Cerberonics, Inc.*, 871 F.2d 452, 458, n. 4 (4th Cir. 1989).

Petitioner cites no authority contrary to any of the cases relied on by the District Court. She does not argue that there is a conflict between the decision below and decisions from other circuits. Instead she tries (unsuccessfully) to distinguish the facts of the cases relied on by the District Court.

For example, Petitioner argues *Swentek* is distinguishable, saying the jury verdict in that case was set aside as against the clear weight of the evidence while in the case at bar the District Court granted judgment n.o.v. based on a statute of limitations. However, the District Court in the present case also granted a conditional new trial for the reason the jury verdict was "irreconcilably inconsistent and against the great weight of the evidence." (P. App. at 37A).[16] The same situation existed in *Swentek*, where the

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[16] The jury's answers to special interrogatories – that Nelson was outrageous because it did not have a written policy on sexual harassment, as well as its explanation of its disparate damage awards against Noah and Nelson – are two further examples of the verdict's infirmity. At best, the jury was mis-

jury verdict was found to be against the clear weight of the evidence. 830 F.2d at 552. Thus, Petitioner's efforts to distinguish the cases on which the District Court relied fail.

More importantly, Petitioner offers no reason to grant certiorari. Not only does she lack any authority which conflicts with the authorities cited by the District Court, she cannot escape the conclusion that the issue she proposes is moribund as a result of the Civil Rights Act of 1991.

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guided. At worst, the jurors ignored their oaths to decide the case based on evidence. Under these circumstances, and particularly where a new trial was granted because the jury's verdict was clearly against the weight of the evidence, to require the trial court to be bound by the jury's findings would be a travesty of justice.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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